



**ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY**

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**Commercial Driver Hours of Service: Motor Carrier
Recordkeeping Requirements, Notice of Proposed Rulemaking
63 FR 19457 et seq., April 20, 1998**

The Federal Highway Administration (FHWA) is proposing amendments to motor carrier recordkeeping requirements contained in 49 CFR Pt. 395 for the purpose of improving verification of commercial motor vehicle (CMV) driver compliance with federal hours of service (HOS) requirements for total on-duty, driving on-duty, and off-duty time. The agency in this notice describes a supporting document auditing system that all motor carriers would use to confirm the accuracy of CMV drivers' records of duty status (RODS) and their adherence to the current HOS. FHWA also specifically supports increased use of electronic recordkeeping methods in lieu of paper-only supporting documents maintained by a carrier.

Pursuant to the Hazardous Materials Transportation Authorization Act of 1994 (HMTAA), the Secretary of Transportation was required to prescribe regulations amending Part 395 in order to improve both compliance with the HOS and to enhance the effectiveness of enforcement officers charged with determining such compliance. Among other things, the HMTAA directed that any regulations include a provision specifying the number, type, and frequency of supporting documents that must be retained by a motor in order to permit verification of the accuracy of each CMV driver's RODS. P.L. 103-311, 108 Stat. 1673



(1994), Section 113. FHWA, in the preamble of this rulemaking action, has listed 35 types of documents which are relied on both by motor carriers and enforcement officers to verify RODS and HOS compliance. 63 FR 19457, 19458. However, it is clear that the agency does not intend this to be an exhaustive listing.¹

I. The Goals of Motor Carrier Self-Monitoring of Hours of Service and Records of Duty Status.

FHWA's major purpose in this rulemaking is to encourage motor carriers to assume an active role in maintaining and offering documentation of CMV driver RODS accuracy and HOS compliance. To this end, the agency has proposed to implement another provision of the HMTAA to authorize motor carrier self-compliance systems for overseeing adherence to HOS requirements and verifying the accuracy of RODS. This is a goal that Advocates supports. Motor carriers should be encouraged to stop viewing their role in RODS and HOS reviews as only passive recipients of federal and state enforcement actions. Drawing carriers to an assumption of a serious, important management burden that increases highway safety, increases enforcement efficiency, and promotes better relations between motor carriers and government oversight personnel is a highly desirable goal.

¹“These records, among others, are generated by motor carriers for their own business purposes, or they are received from third parties . . . ” Id. (emphasis supplied).

II. Current Motor Carrier Compliance With Commercial Driver Hours of Service Limits Is Largely Unknown.

However, although Advocates supports the general concept of self-monitoring, we are concerned with a number of features of the proposed rule, including averments by the agency concerning the current status of carrier self-monitoring/compliance systems and the present quality of carrier and driver compliance with federal HOS regulations. With regard to the claims made by FHWA about the current status of motor carrier self-monitoring systems, FHWA asserts that "there is no need to impose additional stringent record-collection and maintenance requirements on motor carriers and drivers, when most motor carriers already have such systems and are successfully monitoring and enforcing the regulations." Id. at 19459. FHWA also asserts its belief that "most motor carriers and drivers are meeting their responsibility to conduct safe operations by complying with the HOS regulations." Id.

Advocates strongly disagrees with the accuracy of both of these claims. First, they are conclusory statements without any evidence marshalled in the instant notice or elsewhere to confirm their veracity, and, hence, these confident beliefs are gratuitous statements. Second, as the U.S. Department of Transportation Inspector General report of March 26, 1997,² shows in detail, it is beyond argument that FHWA does not know and cannot know the status of most interstate motor carrier and driver compliance with HOS requirements.³ Similarly, the agency

²Office of Inspector General Audit Report: Motor Carrier Safety Program, Federal Highway Administration, Report Number AS-FH-7-006, March 26, 1997 (OIG Report).

³A claim that motor carriers are regularly complying with HOS requirements has repeatedly
(continued. . .)

does not and cannot know the state of motor carrier oversight systems for ensuring driver compliance with HOS and the accuracy of RODS. FHWA has not rated most motor carriers, a failure which is a direct violation of Section 215 of the Motor Carrier Safety Act of 1984. FHWA conducts only a small number of compliance reviews (CRs) in any given year, a number which does not supply a sufficient sample to allow the agency to gauge the level of national compliance with HOS and the accuracy of the RODS maintained by drivers. In FY 1995, for example, FHWA performed CRs of only 2.5 percent of registered interstate carriers and more than half of these CRs were repeats of carriers already rated. The overwhelming majority of carriers under the jurisdiction of the FHWA either have never been rated or their ratings are badly outdated. In fact, FHWA can determine or ensure the safety fitness of only a very small portion of the nearly 425,000 registered interstate carriers and the problem continues to grow worse each year. For example, from FY 1990 to FY 1995, the number of unrated carriers virtually doubled.

Third, HOS and RODS violations are notoriously difficult to detect, even for seasoned inspectors, and the extent of ingenuity applied by some carriers and drivers to conceal even chronic violations of both HOS and RODS is almost limitless. In a high percentage of instances, these violations are made even more difficult to detect because they are not egregious breaches of on-duty, driving, and off-duty rest time limits, but rather marginal violations which

³(... continued)

been belied by roadside inspection figures which have often shown up to one-third of all reviewed drivers placed out of service for HOS violations.

are studied choices for maximizing both profit and, especially, the competitive posture of many carriers. This manipulation of HOS limits has particularly become pronounced since the advent and rapid growth of Just In Time (JIT) delivery scheduling. Moreover, given the poor record of enforcement actions by FHWA against even repeat offenders for HOS/RODS violations and the generally low or even non-existent fines levied against carriers for chronic violations, few carriers regard citations and fines for HOS/RODS violations as little more than a cost of doing business.

Furthermore, contrary to the agency's sanguine view of carrier compliance with HOS, it is probable that most carriers, especially larger ones with many trucks, have an imperfect idea of whether their drivers are complying with HOS requirements and whether drivers' RODS are accurate recordations of such compliance. Even more, it appears certain that many carriers in fact have no capability to ascertain the quality of HOS compliance and the veracity of RODS. This failing was recently voiced by Mr. Al Urwin, manager for Werner Enterprises,⁴ who asserted that "[i]t's impossible to audit every paper log * * *." ⁵

In any case, as emphasized in the OIG Report, the agency itself has not evaluated the effectiveness of fines or compliance orders in achieving regulatory compliance, or even determined the level at which fines become an effective enforcement tool because of their

⁴See, below, p. 15 and footnote 9.

⁵*Transport Topics*, June 15, 1998, p. 1. It is difficult to understand how FHWA awarded a waiver to Werner Enterprises to substitute electronic technologies for ascertaining HOS compliance given the implication that there is no effective way of ensuring conformity to federal regulation and verifying the accuracy of drivers' RODS logbooks.

deterrent effect throughout the industry. FHWA does not have either the resources or the willingness to change dramatically the quality of compliance with HOS/RODS for interstate carriers and the instant rulemaking amply demonstrates this. Evaluated in the cold light of how efficacious the FHWA system of federal oversight and enforcement really is in blunting the attraction of violating HOS/RODS, or even in adequately assessing the extent of such violations, it must be admitted that the U.S. trucking industry is essentially left in a self-regulating condition. Given the practical impossibility of some carriers even to audit HOS compliance and RODS accuracy in a timely manner, the American trucking industry's adherence to the regulatory limits of federal HOS requirements is actually little more than an honor system.

III. The Proposed Self-Monitoring Regulation Lacks Necessary Uniformity and Creates an Ineffectual and Inequitable Ad Hoc Enforcement Regime.

We have provided this short review of the agency's incapability of enforcing, or even in ascertaining, the quality of HOS/RODS compliance because it sets off in relief the fundamentally inadequate, unacceptable approach FHWA has offered in this rulemaking. This approach is another example of the laissez faire attitude of the agency in fulfilling its statutory responsibility to protect and enhance the health and safety both of CMV drivers and of the public sharing the roads with large trucks. FHWA proposes to allow motor carriers themselves "to specify in their system the supporting documents, including automated electronic, or laser systems, that would provide the best opportunities to verify the accuracy of the records of duty status." Id. at 19461. In its essence, this proposes an ad hoc recordkeeping and enforcement regime. This approach will result in each motor carrier devising its own amalgam of documents

which may not ensure that an effective system of HOS/RODs verification is in place. The agency has no credible basis demonstrated in this rulemaking for assuming that such an amorphous scheme will produce widespread, improved adherence to reasonable self-monitoring systems, much less result in measurable reductions of violations and, in turn, measurable improvements in motor carrier and highway safety. In fact, given the paucity of enforcement reviews, most carriers can proceed for years on the false confidence that their selected self-monitoring systems are valid and appropriate.

Moreover, FHWA arrogates continuing authority to “inspect other motor carrier records not identified in the motor carrier’s system, to determine whether the system is effectively verifying the accuracy of the RODS. ” Id. This means that agency discretion is essentially unfettered and that, even despite a good faith effort by a carrier to denominate and rely on certain specific documents, including those delineated in the preamble of this proposed rule, for overseeing and verifying HOS/RODS compliance, an enforcement agent could nevertheless still pronounce these to be insufficient, require specific additions or other alterations to the carrier’s document scheme, and even take additional enforcement action to fine a carrier for failure to comply with HOS/RODS requirements. ⁶

Advocates cannot support such a “system. ” Its operation is little more than applying the dictum that “all that succeeds is success” : the determination of whether a self-monitoring system passes muster, even one constructed in good faith, is an ~~ex post facto~~ enterprise. h

⁶FHWA, however, promises that additional punitive action would not occur in the first instance. See, *id.*, at 19461.

an approach avoids having the agency demarcate which documents, given its long experience, are preferable and more accurate indicia of compliance. It is impossible to believe that the alphabetically arranged review of documents in this notice are all viewed as equivalent for reliable verification of compliance with HOS/RODS requirements. Yet, instead of providing leadership and appropriate guidance to carriers willing to improve their systems of oversight, FHWA leaves them to their own devices.

IV. The Proposed Self-Monitoring Regulation Both Violates Federal Law and Undermines Motor Carrier Safety Improvement.

Section 113 of the HMTAA directs the Secretary to prescribe regulations that will improve compliance by CMV drivers with HOS requirements and the effectiveness and efficiency of federal and state enforcement officers reviewing such compliance. The proposed self-monitoring scheme cannot ensure such HOS compliance improvement, cannot verify that such improvement has occurred, and simply creates an enforcement regime that perpetuates the lack of uniform enforcement criteria and action that has been a hallmark of FHWA oversight of the Federal Motor Carrier Safety Standards. In particular, the proposed self-monitoring system violates the statutory command of Congress in Section 113 for the Secretary to specify "the number, type, and frequency of supporting documents that must be retained by a motor carrier so as to allow verification of the accuracy of such documents * * *"

FHWA cannot read the force and effect of paragraph (b)(2) of Section 113 in isolation from subparagraph (b)(4). The agency has a responsibility to establish the parameters of paragraph (b)(2) in permitting certain carriers to implement a self-monitoring system. An ad

hoc enforcement regime does not fulfill Congressional intent, does not provide the expertise of the agency in guiding motor carriers before the fact to formulate well-grounded self-monitoring systems, and does not advance the safety either of CMV drivers or of the travelling public that share the roads with large trucks.

Furthermore, FHWA has not complied properly with paragraph (b)(4) because it does not authorize self-monitoring systems on a genuinely case-by-case basis. The agency in fact permits any and all carriers to have self-monitoring systems until an ex post facto judgment by an agency enforcement official nullifies or modifies such a system. Neither are such self-monitoring systems being permitted by the agency "to a group of carriers" meeting specific conditions that may be established by regulation. All carriers are permitted at the outset to have self-monitoring systems of any content and format until told otherwise.

This will not do. Congress clearly intended that the agency vet which carriers could have such monitoring systems and establish the criteria for such systems so that carriers could rely on good faith direction from the agency before such systems were in place. Instead, FHWA has intentionally both circumvented and distorted legislative direction in order to evade (a) the direct evaluation of carriers before awarding some of them the right to use self-monitoring systems and (b) the establishment of clear criteria for which documents should centrally be relied on in establishing and operating a self-monitoring system providing evidence of compliance with HOS and RODS requirements. In attempting to shift the burden almost entirely to carriers on how to acquit the use of a self-monitoring system, the agency has also violated its legislated responsibilities.

V. The Statutory Violations Portended by This Rulemaking Proposal Also Undermine Motor Carrier and Highway Safety.

There is no question that the ad hoc approach to enforcement responsibilities proposed in this notice fails to meet the standard articulated by Congress in Section 113 of the HMTAA. Unfortunately, this approach is not just a technical violation of a statutory requirement -- it can have substantial, adverse safety consequences. Significant numbers of motor carriers can forge inadequate systems of oversight and correlative documentation which will be found deficient in a CR. CMV drivers may have been persistently operating their rigs not only in violation of HOS limits, but also under conditions of fatigue and sleep deprivation which have increased the risks of truck crashes. Yet, FHWA has chosen to provide no guidance on which documents would provide both a superior system of oversight to ensure safer drivers and operations, and a superior system of documentation making enforcement reviews easier and more definitive or reliable in their determinations of compliance or non-compliance. This kind of approach would have directly complied with the dictates of the HMTAA in Section 113. Moreover, an ad hoc enforcement regime such as that proposed in this notice, makes it extremely difficult if not impossible for government oversight offices and committees to determine whether carriers are complying with HOS/ROS requirements and whether enforcement personnel are carrying out their responsibilities in an efficient manner that genuinely advances public safety.

VI. The Use of Waiver Authority In the Proposed Self-Monitoring Regulation Must Comply With Federal Law.

FHWA also indicates in this proposed rule its willingness to consider providing “waivers” on a case-by-case basis for other systems that do not quite meet requirements for maintaining and transferring supporting documents containing a signature to automated, electronic, or laser technology formats. Waivers, pursuant to Section 4007 of the recently enacted Transportation Equity Act for the 21st Century (TEA-21), are limited to three months duration. In addition, Advocates opposes agency actions on important safety issues that accelerate the use of waivers and increase their desirability among members of the motor carrier industry. We believe that the use of waivers can easily become the tail that wags the dog so that regulations as written are ultimately honored only by a minority of regulatees. This notice already contains an ad hoc enforcement regime which Advocates has objected to in the foregoing comments. The use of waivers for a major aspect of how carriers would maintain and forward documents evidencing compliance with HOS and RODS simply compounds the problems of this proposed rule: the unique circumstances and operations of each waived party are superimposed upon a self-monitoring regulation that already creates an ad hoc enforcement regime lacking any uniformity both in the agency regulatory guidance which should provide a level playing field for compliance and in the actual self-monitoring schemes adopted by motor carriers.

VII. The Proposed Self-Monitoring Regulation Is Inequitable and Prevents Uniform Federal Enforcement.

Strangely enough, the agency appears willing to nullify this ad hoc approach to enforcement following a review that finds the existing carrier self-monitoring scheme to be deficient. When this occurs, "the carrier will be put on notice of those deficiencies and directed to collect and maintain specific supporting documents necessary to prevent violations." Id. Asserting that one of the outcomes of a HOS/RODS self-monitoring system review could be an indication of potential violations and an impromptu requirement to retain specific records for oversight and compliance verification lays a trap for each motor carrier attempting compliance.

Advocates cannot understand why the agency fails to provide uniform guidance on which classes of documents are preferable, and which have lower-order importance, that carriers might use to model their self-monitoring systems from the start and therefore help to increase motor carrier safety sooner rather than later. Providing strong agency leadership from the start would also increase the efficiency of enforcement reviews. Although FHWA may believe that identifying a roster of core documents somehow truncates its discretion or reduces motor carrier management flexibility, the agency in fact assumes a considerable burden when it asserts its right to characterize a self-monitoring scheme as deficient: if a carrier has already created a system of documentation and presents this along with the specific records that attest to HOS/RODS oversight and verification, there could be a tenable presumption that the carrier has conformed to the new requirement for a self-monitoring system.

FHWA goes even further in its zeal to realize a self-monitoring program by listing the consequences of a failure by every carrier to install one. The agency warns the industry that, in the absence of a self-monitoring system, “the FHWA would presume that the motor carrier collects and retains all supporting documents coming into its possession directly or through its drivers or agents for all trips.” Id. In case there might be any doubt about what this entails, FHWA repeats the burden even more emphatically on the next page of the preamble: “The FHWA is proposing that, in the absence of a written and operational verification system, ALL supporting documents be retained for the entire retention period.”⁷ Id. at 19463 (emphasis in the original). However, given the shortcomings of the current proposed rule and the lack of guidance by the agency on which documents count more than others as appropriate demonstration of HOS compliance, the alternatives of maintaining any and all records or establishing a self-monitoring system which nevertheless might be ruled as deficient on an ad hoc basis, is a Hobson’s choice.

Indeed, the fundamental character of the proposed rule is really a Catch-22: despite a clear legislative directive, the agency will not tell the industry which documents are preferred in formulating a good self-monitoring system, but it will be prepared to pronounce some systems as defective on a case-by-case basis. It should be evident without examining it here in detail, that the legal defects of such a “system” reach beyond specific statutory violations to raise

⁷Lest there be any doubt on the matter, “ALL” is a free-floating standard for the agency and presumably includes, but clearly is not limited to, the alphabetized recitation of document types found at the start of the preamble of this proposed rule. See, id., at 19458. Also see, id., at 19466: “Examples of supporting documents are * * *.”

fundamental concerns for due process and notice. In fact, one might surmise that the proposed rule, if adopted, would be far more likely to trigger litigation against the agency than to improve the level of HOS/RODs compliance in any measurable way.

VIII. The Documents Retention Period Should Remain At Six Months.

With regard to the retention period for supporting documents, Advocates strongly opposes a reduction from six (6) to four (4) months. We also would vigorously oppose any legislative attempts either to reduce the retention period below six months or to eliminate the current statutory retention period of six months and consign this to agency discretion. Advocates disagrees with the agency's logic that "it is better able to investigate and sufficiently document a current pattern of HOS violations with records of more recent vintage." The agency has provided no examination for the record of why four months provides a better foundation for enforcement reviews rather than six months. Its support for four months is nothing more than an effort to render the instant rulemaking proposal more palatable by offering to reduce document retention and maintenance burdens. To the contrary, longer retention periods establish a more reliable basis for claims that there are longstanding patterns of recurrent non-compliance by carriers with HOS and RODS requirements and strengthen, rather than, weaken an agency's case that violations are sustained and willful, and therefore merit penalties, for example.

IX. The Issue of Electronic Alternatives to Paper Records of Duty Status Is Posed Prematurely In This Rulemaking.

Similarly, the question of what alternative systems of electronic recordation and retrieval could be acceptable substitutes for actual preparation and maintenance of RODS is a premature inquiry on two counts. First, the agency has no idea how well or badly the regime proposed in this rulemaking would fare in promoting better HOS compliance and more accurate verification of RODS claims. This important area of agency policy directly impacting public safety needs to learn to walk before it can try to run. Second, the agency is only now, in companion actions which are neither referenced nor discussed in this notice, allowing pilot program participation in Global Positioning System (GPS) technology trials of how well such technology can monitor and record CMV drivers' HOS compliance in lieu of written RODS. 63 FR 16697 ~~at seq.~~ i s pilot program has not even begun to operate. The agency needs to determine how well its expectations or hopes have been met in this proposed pilot program before asking whether alternative systems might serve oversight and enforcement purposes, and which systems are preferable.⁸ Also, a recent media announcement from Transportation Secretary Rodney Slater has stated that Werner Enterprises will use a paperless HOS monitoring system relying on GPS. It remains to be seen how well this proves to be a more reliable system of HOS oversight and

⁸FHWA is accepting applications for this pilot program until October 5, 1998. 63 FR 16697. It should be pointed out here that the agency provides no date for the termination of this pilot program. Advocates stresses that Section 4007 of TEA-21 limits pilot programs to a maximum of three (3) years. FHWA needs a supplementary notice advising both the industry and the public of the maximum length of the proposed pilot program.

compliance verification, and to what extent it can be used to other carriers, especially smaller ones, including owner-operators.⁹

The agency needs to coordinate these actions, especially in its discussion of electronic tracking technologies and newly proposed enforcement regimes, such as that advanced in this notice. The GPS technology pilot program and the notice of proposed rulemaking that we have reviewed in these comments were published, respectively, on April 6 and on April 20, 1998, yet they make no mention of each other. This points up the lack of a unified plan for approaching these issues and for notify and involving the public.

X. Conclusion.

The proposed self-monitoring regulation fails to comply with specific legislated requirements for agency implementation and with Congressional goals of ensuring compliance with federal HOS requirements. Moreover, the actual effect of the regulation, if adopted, could retard motor carrier safety improvement and compliance with the HOS regulation, as well as create an inequitable enforcement regime. In addition, the ad hoc enforcement mechanisms proposed in this notice subvert the possibility of oversight verification of the extent to which FHWA has actually improved motor carrier compliance with HOS and RODS requirements.

⁹FHWA has not explained how this “agreement” with Werner Enterprises comports with the April 6, 1998, notice advising of a pilot program using electronic technologies for HOS oversight and compliance verification, i.e., whether Werner is one of the accepted participants in this program, or whether this “agreement” lies outside the confines of the pilot program.

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Also, if adopted, this regulation contains a high potential for legal challenges based upon both specific statutory as well as constitutional grounds.

Respectfully submitted,



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